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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAIME VASQUEZ et al., Defendants and Appellants.	B225354 (Los Angeles County Super. Ct. No. BA346903)

APPEALS from judgments of the Superior Court of Los Angeles County. Jose I. Sandoval and Clifford L. Klein, Judges. Reversed in part and affirmed in part.

Richard C. Neuhoff, under appointment by the Court of Appeal, for Defendant and Appellant Jaime Vasquez.

Donald R. Tickle, under appointment by the Court of Appeal, for Defendant and Appellant Abel Rodriguez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Steven E. Mercer and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellants Jaime Vasquez and Abel Rodriguez of first degree murder in violation of Penal Code section 187, subdivision (a) in count 1.[1] The jury found that Vasquez personally used and discharged a firearm causing death under section 12022.53, subdivisions (b), (c), (d), and (e). In Rodriguez's case, the jury found that a principal had personally used and discharged a firearm causing death under section 12022.53, subdivisions (b), (c), (d), and (e). With respect to both appellants, the jury found that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b). In counts 2 and 3, the jury convicted Rodriguez of being a felon in possession of a firearm[2] in violation of section 12021, subd. (a)(1) and found that he committed these crimes for the benefit of a criminal street gang within the meaning of section 186.22, subd. (b)(1).[3]

The trial court sentenced Vasquez to a term of 50 years to life in count 1, consisting of 25 years to life for the murder and a consecutive 25 years to life for the firearm-use enhancement under section 12022.53. The trial court also sentenced Rodriguez to a total term of 50 years to life in count 1, consisting of 25 years to life for the murder and a consecutive 25 years to life for the firearm-use enhancement under section 12022.53. The trial court imposed concurrent sentences of five years for each of counts 2 and 3 in Rodriguez's case, along with concurrent gang enhancements of three years in each of those counts.

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1 All further references are to the Penal Code unless stated otherwise.

2 On December 23, 2004, Rodriguez had been convicted of grand theft auto in Los Angeles County Superior Court case No. BA275523.

3 A third defendant, Damian Rocha, was found not guilty of the murder and the accompanying firearm-use and gang-benefit allegations.

Appellants appeal on the grounds that: (1) the trial court prejudicially erred in allowing certain remarks by an investigating detective regarding the surreptitious jailhouse recording; (2) the gang enhancements must be reversed for several reasons; (3) the firearm-use enhancements must be set aside, since they are based on the challenged gang enhancements; (4) the trial court erred in refusing to instruct the jury regarding voluntary manslaughter; (5) the reading of CALCRIM No. 400 resulted in a violation of due process, the right to trial by jury, and a lessening of the prosecution's burden of proof; (6) cumulative error was prejudicial under state law and federal constitutional law; (7) counts 2 and 3 must be reversed because the verdicts were not read in open court; (8) there was insufficient evidence to support the true finding on the gang enhancements in counts 2 and 3; (9) Rodriguez is entitled to additional custody credit, and (10) any issue deemed forfeited was the result of ineffective assistance of counsel. Rodriguez joins in Vasquez's arguments regarding the gang-based sentencing enhancements (§§ 186.22, subd. (b); 12022.53, subds. (b), (c), (d), and (e)) in count 1. Vasquez asserts that he joins in and adopts by reference all arguments raised by Rodriguez.

FACTS

Prosecution Evidence

On April 19, 2008, Carl Cerda, a member of the Laguna Park Vikings gang, attended a party in territory claimed by the King Kobras gang. Cerda's 17-year-old brother, Joseph, was hired to be the disc jockey at the party, and two more of Cerda's brothers, Dominic (age 15) and Giovanni (age 11), were in attendance.[4] Cerda went to the party to look after his brothers, who were not gang members. Dominic brought along his girlfriend, Lisett Raigosa. Cerda's girlfriend, Jessica Galindo, and Jessica's sister, Janice Galindo, also attended.

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[4] Because some of the witnesses and one of the defendants share surnames, we will refer to the witnesses by their first names, except for Detective Rodriguez, who is distinguishable by his title.

Shortly before 10:00 p.m., Lisett and Jessica left the party to drive two friends, Tiffany Alvarez and Valerie, to a club in Glendale. Tiffany and Valerie picked up the other two girls in Tiffany's white Suzuki, and Jessica took over the wheel. About five minutes after the girls left the party, a man who looked like a gang member approached Dominic and asked where he was from. Dominic knew that asking "Where you from?" is a way of finding out if someone is in a gang or a tagging crew. Dominic responded that he was from nowhere. The man identified himself as "Criminal from King Kobras." He had been among a group of 15 men at the party who appeared to be "gang-related" and who were standing around a table about 15 feet from Dominic and Cerda. The men appeared to be from a gang because of their shaved heads, baggy pants, and tattoos. Among them were Rodriguez, who was wearing a Dodger jacket, and Vasquez, who was wearing a black pullover or hoodie. Criminal then asked Cerda where he was from, and Cerda responded, "Laguna Parque." Criminal asked Cerda, "You know where you're at?" Cerda replied that he did and said he was just looking after his brothers. Criminal shook hands with Dominic and Cerda and walked back to the group of gang members and spoke with them.

Five of the men with whom Criminal spoke immediately approached Cerda. Vasquez asked Cerda if he knew where he was, and Cerda repeated that he was just looking out for his brothers. Vasquez asked Cerda if he wanted trouble. Cerda said he did not, and Vasquez responded by punching Cerda in the head. At this point, a fight broke out. Five or six men, including Rodriguez, jumped Cerda and began punching him. The gang member Criminal was not among the attackers.

Cerda was able to land a few punches even though he was outnumbered. Dominic did not see any weapons during the fight, which remained a fistfight for the minute that it lasted. Two men tried to break up the fight by separating appellants and the other King Kobras from Cerda. Cerda hit Rodriguez with a "good punch" in the mouth, which made Rodriguez's lip bleed. Rodriguez wiped away the blood, and Dominic did not see any more blood on Rodriguez. After being hit, Rodriguez pulled out a handgun from his

waistband and waved it around, which ended the fight. Everyone at the party, including Cerda, began running away, and the party broke up. Dominic said to Rodriguez, "Hey, that's my brother," and Rodriguez responded, "I don't give a fuck, this is my varrio."

Dominic ran to the front yard, and Cerda ran off and hid. The men who had attacked Cerda started searching for him. Dominic saw Cerda come out from somewhere in the back of the house and go to a house diagonally across the street from the party house. Cerda entered the open front gate of the house, and Dominic followed him. Cerda ran toward the backyard of the house, looking for a place to hide. Dominic ran back to the street and saw Rocha. Because Dominic had earlier gotten the impression that Rocha was a good guy, Dominic told Rocha that the man they were looking for was his brother. Rocha responded, "I don't give a fuck, fuck the Parque."

Dominic and Cerda called Lisett and Jessica on their respective cell phones, telling the girls to come back right away and pick them up. Jessica immediately headed back to the party. Jessica drove, Tiffany was in the front passenger seat, and Lisett and Valerie were in the rear passenger seats. While they were driving back, Cerda called Lisett again and said they had to get there right away. When the girls arrived, Cerda approached the car and motioned Jessica into the driveway of the house where he had previously tried to hide. From across the street, Rocha pointed at Cerda and yelled, "He's right there."

When Tiffany tried to open the car door so that Cerda could get in, he signaled her to keep the door closed and she obeyed. Vasquez approached the car and angrily banged on the front passenger window with an object that sounded like metal. He tried to open both the front and the rear passenger doors. Rodriguez tried to open one of the car doors from the driver's side. Cerda ran up onto the porch of the house and pounded on the front door. Rodriguez passed a gun to Vasquez and said, "shoot him, shoot him" several times. Vasquez turned and fired five or six shots at Cerda as Cerda crouched on the porch trying to cover himself with some chairs. After the shooting, Jessica got out to go to Cerda. As she went around the back of the car, she came face to face with Vasquez

and got a good look at him. Jessica and Dominic saw Cerda underneath the chairs, bleeding profusely.

Lisett called an ambulance. Paramedics were unable to revive Cerda, and he died as the result of his gunshot wounds. One fatal wound was to the chest and the other to the head. Cerda also suffered a nonfatal gunshot wound to his upper left arm.

In April 2008, Dominic identified Rodriguez in photographic lineups. He also identified him at trial. Dominic was unable to identify Vasquez in the photographic lineup, but he identified him in court and was confident of his identification. Jessica identified both appellants in a photographic lineup and at trial. Lisett identified Rodriguez in a photographic lineup and at trial. Lisett identified Vasquez at trial. She had gotten a good look at him as he tried to open the car door. In April 2008, Lisett had identified a picture of Vasquez as one of two men who looked familiar in a photographic lineup, stating that the picture of Vasquez looked more familiar and more like the shooter than the other. Tiffany identified Vasquez both in a photographic lineup and at trial. Tiffany identified Rodriguez in court and was confident of her identification. When Tiffany was shown a photographic lineup, she said that all the suspects looked similar, but that two of the men looked more like the man who handed the gun to Vasquez. She identified a picture of Rodriguez as the man who looked the most like the man who gave Vasquez the gun.

Police found seven .45-caliber shell casings on the driveway where the shots had been fired, which indicated that a .45-caliber semiautomatic handgun had been used. There was a significant amount of blood on the porch where Cerda had been shot. There was also a lot of blood on the driveway, at the bottom of the driveway, approximately one foot from the gate of the residence, and on the lawn. DNA tests showed that this blood came from Cerda.

There was a trail of blood drops on the sidewalk across the street from the shooting scene, and it ended approximately two or three houses from Vasquez's residence. DNA testing showed that the blood was Rodriguez's.

Police found a knife with a black bandana wrapped around it on the porch where Cerda died. The criminalist testified that either the knife or the bandana appeared to have blood on it. On her report, however, there was no notation about the presence of blood on these objects, and she did not collect genetic material from them. Since Cerda was shot on the porch, the criminalist did not collect blood from that area, but instead focused on the other blood stains she found.

Dominic testified that Cerda owned a black switchblade and usually carried it, but Dominic did not see it during the party or on the porch. Dominic had previously testified that Cerda had the knife that night. Jessica had never seen Cerda with a knife and did not recognize the knife found on the porch as his knife. Jessica did not see the knife on the porch the night of the shooting. She thought Cerda carried a box cutter with him on occasion.

Detective Michael Rodriguez of the Los Angeles County Sheriff's Department (LASD) was the investigating officer in Cerda's murder. At no point in his investigation did he receive any information that anybody had been stabbed. When he wrote in his May 2008 police report that one of the suspects may have sustained a "laceration," he meant that one of them may have been involved in a fight and suffered a bloody nose or lip, or a cut eye. He decided not to conduct DNA testing of the blood on the knife because he assumed it was Cerda's. The shooting scene was chaotic because witnesses and paramedics had been on the porch. The fact that the knife was found on the porch did not necessarily mean it was on the porch at the time of the shooting. Items, such as the chairs, had been moved to the front lawn, and things are often moved around during the paramedics' life-saving efforts. In addition, the witnesses indicated that appellants were at the base of the porch when Cerda was shot. Based on the totality of the circumstances of the investigation, Detective Rodriguez did not believe the knife was significant.

In the backyard of the house where the party occurred, police found a notebook and several pieces of cardboard bearing King Kobras gang graffiti and graffiti from the

"Cyclones" clique of that gang. The notebook contained appellants' and Rocha's gang monikers. Rocha was known as DR-1, Vasquez was known as Sinner, and Rodriguez was called Nite Owl. The entries in the notebook indicated that all three men were associated with the King Kobras gang. The backyard also contained some beer bottles with "King Kobras" graffiti on them.

On July 13, 2008, at 1:55 a.m., Deputy M. Navarro of the LASD spotted Rodriguez in the area of the 1200 block of Herbert Avenue in East Los Angeles. Deputy Navarro attempted to detain him, but Rodriguez fled on foot. As he ran, Rodriguez reached into his waistband and tossed a gun onto a porch near 1250 Herbert Avenue. Deputy Navarro found a .45-caliber firearm on the porch. The bullets and shell casings did not match those recovered at the Cerda crime scene.

On September 24, 2008, the police arrested appellants when several deputies from the LASD went to Rodriguez's South Record Avenue residence to conduct a parole search. Detective Joel Flores went behind the house and saw Rodriguez run out the back door with a black handgun in his right hand. Rodriguez climbed onto the roof and began running across the roof tops. Detective Edward Aguirre climbed onto a roof and caught Rodriguez. The two fell from the roof and several deputies took Rodriguez into custody. The deputies found Vasquez inside Rodriguez's residence. Detective Flores searched the rear of Rodriguez's residence and found a nine-millimeter Smith & Wesson handgun lying against the house.

On September 25, 2008, the day after the arrest, the police separately interviewed appellants. Rodriguez admitted that he had pulled out a gun at the party but told the police that he had left before the shooting. He also told police that the gun he had at the party was the nine-millimeter handgun he had when arrested. During his interview, Rodriguez did not say anything about being stabbed or cut on the night of the party.

After their interviews, deputies placed appellants in adjoining cells in a row by themselves. The cells were equipped with listening devices to record their conversation. A recording of the conversation was played for the jury, and a transcript was distributed

to the jury. The recording revealed that both Rodriguez and Vasquez told the police that the fight had started because Rodriguez wanted a balloon with helium, and Cerda would not give it to him, so they hit him. They both had said during the interview that they left the party before the fight started. Vasquez told Rodriguez that he eventually admitted, "Yeah, me and [Rodriguez] jumped this guy." Vasquez said the detectives told him that they knew Rodriguez had a gun. Vasquez told the detectives he was unaware of that, and said that "maybe [Cerda] stabbed somebody." In response, the detectives told Vasquez that Rodriguez had not said anything like that, and Vasquez then told them he was not sure. Later on in the recording, Vasquez again mentioned that he told the police Rodriguez had been stabbed. Rodriguez then said to Vasquez, "Eh, you should have told them the truth."

At one point in the recording, Vasquez said that people have camera phones, and "people know what we had." Rodriguez said that the detectives told him the same thing. Rodriguez lied at first, but the detectives told him, "What if we were to tell you, you had a blue Dodger jacket on?" At that point, Rodriguez told Vasquez, he "was like, 'Oh fuck.'" Rodriguez admitted that he should have "stashed" his firearm, but he had it with him because he was getting ready to "jam."

Rodriguez told Vasquez that the detectives asked him the location of the gun that he had on the night of the shooting, and he told them that it was the one he "got busted with." Rodriguez insisted to the detectives that the gun he had on the night of the shooting was the one he had when he was "cracked," or arrested. Rodriguez told Vasquez that the nine-millimeter was not the gun. When Vasquez asked where the gun was, Rodriguez responded, "Chata" (another King Kobras member) had it. Vasquez asked Rodriguez if he was serious and then asked, "Which one was it?" Rodriguez said it was "the 45." Vasquez responded, "Oh, yeah." Vasquez also said, "I don't know what kind of evidence they got," and "I don't know who's snitching" He said, "Let them say it was me. I know I didn't shoot nobody."

Detective Eduardo Aguirre, testifying as a gang expert, told the jury that the King Kobras gang is an East Los Angeles criminal street gang that had approximately 150 documented members at the time of trial. The gang commits various crimes, including murder, drive-by shootings, robberies, sales of narcotics, possession of narcotics, possession of handguns, vandalism, burglary, and vehicle theft. There are different ranks of gang members. Hardcore gang members are those that commit violent crimes on behalf of the gang and have more significant tattoos. The gangs in East Los Angeles that Detective Aguirre knew were territorial. By controlling their territory, the gang members instilled fear in a community and thus were able to commit their crimes, such as selling narcotics, committing robberies, burglaries, and car theft.

Aguirre stated that Vasquez is a self-admitted King Kobras gang member who has prominent tattoos indicative of his gang affiliation. Rodriguez is also a self-admitted King Kobras gang member with prominent tattoos showing his gang membership. Both appellants were active King Kobras gang members at the time of trial. Detective Aguirre also believed that Rocha was an active King Kobras gang member.

Among the King Kobras' known enemies was Cerda's gang—the Laguna Park Vikings. The rule among gang members is that you do not go into a rival gang's territory unless it is to commit a crime against the rival gang. By entering enemy territory, a rival gang member is "taking a chance." The consequence of admitting that you were from a rival gang could be anything from being assaulted with fists and kicked out of the neighborhood to being killed. Detective Aguirre testified regarding two predicate crimes committed by King Kobras members. In *People v. Vasquez* (case No. BA336476), King Kobra member Steven Vasquez (Little Sinner) was convicted of being a felon in possession of a firearm. In *People v. Sanchez* (case No. KA076353), King Kobra member Tommy Sanchez (Termite) was convicted of carjacking.

Based on the circumstances of the shooting, Detective Aguirre believed that appellants committed it for the benefit of their criminal street gang. The party was in King Kobras territory and at a King Kobras member's house. After Cerda was asked

where he was from by a King Kobras member, that gang member went back to talk to several other members of the gang, including appellants. One of the appellants punched Cerda, the other produced a gun. The King Kobras members chased down the victim after he had escaped. Finally, King Kobras member Rodriguez handed his gun to King Kobras member Vasquez and ordered him to shoot Cerda, which Vasquez did. The crime benefited the gang and enhanced its reputation because murder was the ultimate crime for a gang. For that same reason, the individual gang members' reputations were enhanced within the gang and their territory, as well as with rival gangs.

Detective Aguirre also believed that, on the two occasions where Rodriguez was seen to possess a firearm, he did so for the benefit of the King Kobras. By possessing the firearm in his neighborhood, he was armed and able to commit various crimes. The firearm was also available to defend himself against members of other gangs or for use by other gang members.

Defense Evidence

Appellants presented no evidence in their defense.

DISCUSSION

I. Detective Aguirre's Comments on the Jailhouse Recording

A. Vasquez's Arguments

Vasquez contends the trial court erroneously overruled defense counsel's objection to a portion of Detective Rodriguez's testimony that referred to the jailhouse recording. The detective implied Vasquez's words showed that he knew the gun Rodriguez had with him when arrested was not the gun used to shoot Cerda. Vasquez argues that, if considered expert testimony, the detective's testimony was inadmissible as irrelevant in that he did not shed light on a subject beyond common experience. If viewed as lay opinion testimony, Vasquez contends, the detective's testimony was equally inadmissible. The detective did not say anything that could not be fully understood without expressing his opinion that Vasquez knew which type of weapon was used in Cerda's murder.

According to Vasquez, reversal is required because the recorded conversation was a crucial part of the case for both sides. The prosecutor cited it in argument for the fact that appellants "knew exactly which gun was used to kill Carl Cerda." With respect to Vasquez's defense, the recording was the only affirmative evidence that contradicted the four identifications by prosecution witnesses. Quoting *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 (*Killebrew*), Vasquez argues that Detective Rodriguez's testimony "'did nothing more than inform the jury how [the detective] believed the case should be decided,'" rendering the trial fundamentally unfair.

B. Proceedings Below

As previously noted, Vasquez and Rodriguez were placed in adjoining cells at the East Los Angeles Sheriff's Station, and their conversation was recorded. After the recording was played for the jury, Detective Rodriguez explained that there was "hold-back information" in the case, i.e., information that only the investigators and perpetrators knew about. The hold-back information was that the handgun used in the shooting was a .45-caliber weapon. In direct examination, the prosecutor pointed out to Detective Rodriguez that Vasquez had asked Rodriguez "where's the one," and the response was "Chata has it." The detective explained that Chata was another King Kobras member. The detective translated Vasquez's reply as, "Are you serious?" The prosecutor noted that Rodriguez then said he told police that the gun he had when arrested, a nine-millimeter, was the same one he had on the night of the shooting.[5] The

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[5] The pertinent dialogue is as follows: "[V] I didn't blast nobody, ese. [R] Me neither, fool. [V] You're not busted for murder. I bet you're they're going to say—they said, 'Well, we got to talk to the DA and this and that, and then we'll see if they want to file charges.' Come on now. What do you got on me? They don't got no cuete, you know? [R] Yep. [V] They just to a bunch of people saying this and that. [R] They're like, 'So where's that cuete?' I told him, 'That's the one I got busted with.' [V] Which one? [R] The 9. [V] *** [R] The one I got—well, yeah, 'They're like'—the cuete I had that night, I told them was the one I got cracked with tonight.' [V] Yeah. [R] What kind? The 9. [V] But that's not the one? [R] No. [V] Where's the one? [R] Chata

prosecutor then asked the detective if there was anything significant in this conversation. Detective Rodriguez replied, "Specifically the firearm having been hold-back information, and the tone and tenor of that conversation, based on what they were talking about and what I had discussed with both of them, respectively, that Abel Rodriguez had told us that the gun that he was arrested with was the same gun he had on the night of the murder, which was a nine-millimeter which I knew that it wasn't. And then based on the conversation of them discussing it, Mr. Vasquez knowing that that wasn't the one, and them discussing which one was the .45." The prosecutor then asked, "So that was significant to you in terms of signifying to you that they knew information about the murder that you had not shared with them?"

At that point, Mr. Horner, Vasquez's counsel, voiced an objection that the question was leading and argumentative. The trial court overruled his objections. The prosecutor again asked the detective, "What specifically is significant to you, the fact that they were discussing that it appeared that they both knew it was a .45?" Mr. Horner objected that the significance to the officer was irrelevant, and the jury would decide the significance of the evidence. The trial court permitted the question. Detective Rodriguez replied to the prosecutor's question by stating, "Because in listening to these types of conversations when anything can be backed up by evidence, it's—and verified that it also holds more weight for my investigation."

C. Relevant Authority

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.] The

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has it. [V] Serio? [R] Yep. [V] Which one was it? [R] Um, the .45. [V] Oh yeah. [R] But they're like, 'We know you had it' I go, 'Well, then?' And they go, 'We're trying to figure out if its 2 separate incidents."

trial court retains broad discretion in determining the relevance of evidence. [Citation.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177, disapproved on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

D. No Error

It is true that *Killebrew* held it was improper for an expert to express an opinion on whether a "specific individual had specific knowledge or possessed a specific intent." (*Killebrew*, *supra*, 103 Cal.App.4th at p. 658.) Detective Rodriguez, however, was not called as an expert witness, but rather to provide a foundation for the audio recording of appellants' jailhouse conversation. This is manifested by the fact that Detective Rodriguez was not asked about his credentials before testifying about the audio recording. He was asked about his length of service only—a standard question for police officers. His testimony regarding certain gang terms is properly categorized as translation of Spanish slang terms into English—an aspect of his testimony that received no challenge.

In *Killebrew*, the reviewing court determined that, because the expert's testimony provided the *only* evidence to establish the elements of the crime (*Killebrew*, *supra*, 103 Cal.App.4th at p. 659), it "did nothing more than inform the jury how [the expert] believed the case should be decided." (*Id*. at p. 658.) In that case, the gang expert testified that "when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Id*. at p. 652, fn. omitted.) The reviewing court concluded that such testimony was improper because it went to the "subjective *knowledge and intent* of each occupant in each vehicle," a matter "much different from the *expectations* of gang members in general when confronted with a specific action." (*Id*. at p. 658.) In this case, even assuming Detective Rodriguez was testifying as an expert, he was not imputing knowledge to Vasquez based on the behavior of his fellow gang members. Rather, he was testifying about the very objective audio recording containing the spoken words of the two defendants.

Lay opinion testimony is permitted if rationally based on the witness's perception and helpful to understanding his testimony.[6] (Evid. Code, § 800.) "Admission of lay opinion testimony is within the discretion of the trial court and will not be disturbed 'unless a clear abuse of discretion appears.'" (*People v. Mixon* (1982) 129 Cal.App.3d 118, 127.) We believe the detective's testimony falls within the purview of testimony allowed by Evidence Code section 800.

Detective Rodriguez's opinion was based on his own perceptions, and his opinion was helpful to the jury's formulation of a clear understanding of his testimony. Lay opinion testimony is not required to be *necessary* to a clear understanding—it need only be *helpful*. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1306, fn. 11.) The prosecutor merely allowed the detective to clarify the significance to himself of what he heard on the tape—what the "tone and tenor" of the conversation meant to him as an investigator. We conclude the trial court did not abuse its discretion by allowing Detective Rodriguez's interpretation of the significance of the gun discussion between the two defendants to be conveyed to the jury.

In any event, appellant was not prejudiced by the testimony. The trial court instructed the jury that it was not required to accept nonexpert opinion as true or correct and that it could disregard all or any part of such an opinion if it found the opinion unreasonable or unsupported by the evidence. (CALCRIM No. 333.) The instruction also contained guidelines for evaluating such testimony and unequivocally told the jury members that they were entitled to form their own opinions as to what the recording conveyed. The jury is presumed to have faithfully followed the court's instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) Moreover, any error was harmless under any standard due to the abundant evidence of Vasquez's guilt provided by eyewitnesses

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6 Evidence Code section 800 provides: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony."

who got a good look at him. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Vasquez was not prejudiced by Detective Rodriguez's lone statement as to what he gleaned from the recording, and Vasquez's argument is without merit.

II. Arguments Regarding Gang Enhancement Allegations

Vasquez contends that, for various reasons, the gang allegation found true by the jury in count 1 must be reversed. Rodriguez joins in Vasquez's arguments. We set out the pertinent authority and then address each argument in turn.

Section 186.22, subdivision (b)(1) provides for a sentence enhancement when the defendant is convicted of enumerated felonies "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." A criminal street gang is statutorily defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated . . . having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

To prove that a gang is a criminal street gang, the People must establish three elements: (1) that there is an ongoing association involving three or more participants, having a common name, identifying sign, or symbol; (2) that one of the group's primary activities is the commission of one or more specified crimes; and (3) the group's members, either separately or as a group, have engaged in a pattern of criminal gang activity. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*); *In re Alexander L.* (2007) 149 Cal.App.4th 605, 610-611 (*Alexander L.*); *People v. Vy* (2004) 122 Cal.App.4th 1209, 1222.)

"Proof that a gang's members consistently and repeatedly have committed criminal activity listed in section 186.22, subdivision (e) is sufficient to establish the

gang's primary activities. On the other hand, proof of only the occasional commission of crimes by the gang's members is insufficient. [Citation.] Past offenses, as well as the circumstances of the charged crime, have some tendency in reason to prove the group's primary activities, and thus both may be considered by the jury on the issue of the group's primary activities. [Citation.]" (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465; see also *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*); *People v. Galvan* (1998) 68 Cal.App.4th 1135, 1140.) As the jury members were instructed, if they found appellants guilty of the charged crimes, they could consider those crimes in deciding whether one of the group's primary activities was commission of that crime. (CALCRIM No. 1401.)

It is settled that the primary activities element may be established through expert testimony. "The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities." (*People v. Duran, supra,* 97 Cal.App.4th at p. 1465; see also *People v. Vy, supra,* 122 Cal.App.4th at p. 1226; *People v. Augborne* (2002) 104 Cal.App.4th 362, 372.)

When determining whether the evidence was sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "[T]he test of whether evidence is sufficient to support a conviction is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 667.) "We draw all reasonable inferences in support of the judgment." (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears that "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The same standard holds true for an enhancement. (*People v. Augborne*, *supra,* 104 Cal.App.4th at p. 371.)

A. Foundational Fallacy Leading to Insufficient Evidence of the Gang's Primary Activities

Vasquez contends that the due process provisions of the Fifth and Fourteenth Amendments require the gang enhancement to be stricken. He claims there was not substantial evidence to support the required finding that the commission of crimes enumerated in section 186.22, subdivision (e) was one of the primary activities of the King Kobras. He asserts that his argument is based on "plain English and freshman logic" in that something must be secondary for something else to be primary, and there was no evidence at all about what the King Kobras' other activities were. He argues that, even though the statute requires only that criminal conduct be *one* of the group's primary activities and not the sole primary activity, the concept of primary activities is still one of comparison.

In this case, the gang expert testimony was provided by Detective Aguirre, a gang detective who had worked out of the East Los Angeles Sheriff's Station for eight years at the time of trial. He was familiar with the King Kobras gang. He had been personally involved in investigating crimes committed by King Kobras. When asked what type of crimes the gang members commit, Detective Aguirre said they are involved in murder, drive-by shootings, robberies, sales of narcotics, possession of narcotics, possession of handguns, vandalism, burglary, and stealing vehicles.

Detective Aguirre also testified about specific crimes committed by the gang's members. He said that in case No. BA336476, Steven (Little Sinner) Vasquez, a member of the King Kobras gang, was convicted of possession of a handgun by an ex-convict, and the date of the offense was February 14, 2008. Steven Vasquez was a King Kobras gang member at the time the crime was committed. In case No. KA076353, Tommy (Termite) Sanchez was charged with having committed a carjacking in September 2006 while he was a King Kobras gang member. Tommy Sanchez was convicted. The evidence showed that the two King Kobras gang members on trial were guilty of murder, and Rodriguez was guilty of two counts of possession of a firearm by a felon.

The absence of evidence concerning the way King Kobras gang members pass their time when they are not committing crimes—for example, how often they have barbecues, how much time they spend watching television and drinking beer, etc., does not preclude a gang expert from having a well-founded opinion that one of the gang's primary activities is committing certain crimes. Freshman logic aside, the statute does not require the People to provide a statistical analysis that shows that committing crimes occupies more of the gang members' time than any other activity in which they engage. The language of the statute requires only that the People show that one of the primary activities of the group or association itself be criminal. (*Sengpadychith*, *supra*, 26 Cal.4th at pp. 323-324, citing *People v. Gamez* (1991) 235 Cal.App.3d 957, 970-971, disapproved on another point in *Gardeley*, *supra*, 14 Cal.4th at p. 624.) Appellant would have us believe that the type of evidence authorized by case law such as *Sengpadychith* is flawed by the "Fallacy of Selective Observation" because it draws "a conclusion as to primacy based on facts selectively observed and reported." What we believe is that appellant's argument is fatally flawed by the Fallacy of the Red Herring. Appellant offers neither authority nor a methodology for the determination of a gang's primary activities as a proportion of the gang's daily activities in general. Appellant's thesis also begs the question of whether the amount of time spent doing activities other than crimes can be the counterpoint when it takes more time to watch a movie than it does to commit a carjacking. Or perhaps one needs merely an enumerated list of a gang's other activities, resulting in gangs having the most "other" activities being exempt from having their members' crimes defined as one of their primary activities. And one can only speculate about the number of witnesses required to present these types of evidence.

Sengpadychith held that the same type of proof as offered here was sufficient to prove the "primary activity" element, i.e., proof that gang members consistently and repeatedly engage in criminal activity specified in the gang statute by means of a police gang expert, based on conversations with gang members and personal investigations of crimes committed by gang members. (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324.) As

an intermediate appellate court, we are bound to follow the lead of our highest state court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) There was no need for the jury to be provided with mathematical or statistical analyses based on the King Kobras lifestyles. The jury could draw a strong inference from the events on the night of April 19, 2008, that committing crimes of violence was one of the primary activities of the gang by the fact that their party was the scene of much unprovoked violence, merely because it was a social gathering at the home of a King Kobras gang member. We conclude the type of gang expert testimony approved in *Gardeley* and *Sengpadychith* is sufficient to prove the element of a gang's primary activities, and there was no foundational inadequacy in Detective Aguirre's testimony.

B. Factual Inadequacy

Appellants also argue that Detective Aguirre never claimed that the commission of the crimes he alluded to constituted a primary activity of the gang. He simply said that the King Kobras had committed them and gave no opinion whatsoever as to the primary activities of the gang. According to Vasquez, this is shown by the fact that the list of crimes he attributed to the gang members was broader than the enumerated crimes whose commission is relevant to the concept of primary activities contained in section 186.22, subdivision (e).

As support for this aspect of his argument, appellant relies on *Alexander L, supra*, 149 Cal.App.4th 605. In that case, the reviewing court found there was an inadequate foundation for the gang expert's opinion. (*Id.* at p. 612.) Alexander was alleged to have committed vandalism by engaging in tagging. (*Id.* at p. 609.) In support of the charged gang enhancement, an expert testified generally about the benefits a gang derived from graffiti and stated that Alexander's gang was "an active street gang" on the date of his arrest. When asked about the gang's primary activities, the expert testified, "'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.'" (*Id.* at p. 611.) The

reviewing court noted that "[n]o further questions were asked about the gang's primary activities on direct or redirect examination [¶] . . . No specifics were elicited as to the circumstances of these crimes, or where, when, or how [the expert] had obtained the information. He did not directly testify that criminal activities constituted [the gang's] primary activities, [and] on cross-examination, [the expert] testified that the vast majority of cases connected to [appellant's gang] were graffiti related." (*Id*. at pp. 611-612.) The court concluded the expert's testimony lacked an adequate foundation, since the basis for his knowledge of the gang's primary activities was never elicited. (*Id*. at p. 612.)

In the instant case, however, the foundation for Detective Aguirre's opinion was clearly established in accordance with *Gardeley*. (*Gardeley*, *supra*, 14 Cal.4th at p. 620.) Detective Aguirre had been a peace officer for 19 years and had worked with gangs in East Los Angeles for approximately eight years. He was familiar with the King Kobras gang in East Los Angeles, and he shared information on a daily basis with the Hollenbeck station of the Los Angeles police department. He had previously testified as an expert on the King Kobras as well as on other gangs well over a hundred times. He had personally been involved in investigating hundreds of crimes committed by the gang, and his opinion was largely based on his own personal experience as a gang officer. He had had previous contacts with appellants, had spoken to informants, the investigating officers, other officers who have had contact with "both individuals," other officers who had investigated crimes within the Laguna Park Vikings and King Kobras territories, as well as citizens who live in both areas. He had reviewed the field interview cards, the transcript of Detective Flores's testimony, and the initial investigation report by the patrol deputies. He testified that he acquired a great deal of knowledge from colleagues and older gang members, including original gangsters, or "OG's." He stated that information on the individual gangs is passed down through generations of gang officers, and he had personally spoken to members of the gang, both younger and older members.

As previously noted, Detective Aguirre testified that the King Kobras specifically committed murder, drive-by shootings, robbery, sales of narcotics, vandalism, burglary,

and stealing vehicles, all of which are crimes enumerated in the gang statute.[7] (See § 186.22, subd. (e); *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330.) Detective Aguirre thus testified consistently that the gang's primary activities included enumerated crimes. In contrast, "the expert in *Alexander L*. equivocated on direct examination and contradicted himself on cross examination." (*People v. Margarejo* (2008) 162 Cal.App.4th 102, 107.)

Detective Aguirre's testimony was clearly sufficient even though he did not expressly use the phrase "primary activity," since the prosecutor asked him what type of crimes King Kobras gang members commit. The detective's background and experience demonstrated that his opinion regarding the King Kobras gang's primary activities was a reliable one. (See *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1465 [expert testimony based on "personal investigation of crimes committed by gang members" may be sufficient to prove primary activity element].) Clearly, a group whose members engage in committing all of the crimes named by the detective is one that counts the commission of crimes as one of its primary activities. Appellants' argument is without merit.

C. Alleged Lack of Evidence that the Crimes Detective Aguirre Named Were Gang Related

Vasquez argues that the wording of the gang-benefit statute, i.e., *its* primary activities (§ 186.22, subd. (f)), shows that the offenses that constitute proof of the primary activities of the gang must be *gang-related* offenses. In the instant case, he contends, the prior offenses committed by King Kobras members were not shown to be gang related. As examples, he cites the two predicate offenses mentioned in Detective Aguirre's testimony to show a pattern of criminal activity. Vasquez states that neither of the convictions carried a gang-benefit enhancement. (People's exh. Nos. 61 & 62.)

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[7] Detective Aguirre also mentioned possession of handguns without specifying that the handgun must be possessed by a felon, or be carried in a loaded condition or concealed.

According to the *Gardeley* court, "the Legislature did not intend that the predicate offenses must be 'gang related.'" (*Gardeley*, *supra*, 14 Cal.4th at p. 621.) It intended only that a charged criminal offense be subject to increased punishment if the charged offense is gang related, "that is, it must have been committed, in the words of the statute, 'for the benefit of, at the direction of, or in association with' a street gang." (*Id*. at p. 622.) In any event, Detective Aguirre testified that the primary activities of the King Kobras included many offenses enumerated in the statute. We have already concluded that his testimony was sufficient to satisfy that element of the gang-enhancement statute. Therefore, we reject Vasquez's argument on this point as well.

D. Knowledge of the Gang's Criminal Conduct

Vasquez also argues that the gang enhancement must be reversed because no evidence established that *he was aware* of facts that made the King Kobras a criminal street gang within the meaning of section 186.22, subdivision (b). Specifically, there was no evidence that he was aware that one of the gang's primary activities was the commission of the enumerated offenses. According to Vasquez, this issue involves both statutory interpretation and the constitutional principles related to freedom of association under the First Amendment, the due process clause of the Fourteenth Amendment, and the liberty right to freedom of movement. Any interpretation of the statute that dispenses with an awareness requirement would not be constitutional.

Vasquez contends that *People v. Loeun* (1997) 17 Cal.4th 1 (*Louen*) supports his argument, and he adds that any doubt on this point must be resolved in his favor. In *Loeun*, the defendant argued that constitutional principles of freedom of association and due process mandated an interpretation of the gang enhancement statute that prohibited consideration of the charged offense as a predicate offense in establishing a pattern of criminal gang activity. (*Id*. at pp. 7, 10, 11.) *Loeun* disagreed with the defendant's argument that at least one of the predicate offenses had to be a prior offense, since otherwise he could not "'know' that commission of the current offense would provide the second of the 'two or more' predicate offenses necessary to establish a 'pattern of

criminal activity.'" (*Id*. at p. 10.) *Loeun* refuted the defendant's analogy between statutes that infringe on association rights and the gang statute, stating that the gang statute satisfies the requirements of due process by increasing criminal penalties for *conduct*. (*Id*. at p. 11.) Furthermore, the conduct must be "'felonious and committed not only "for the benefit of, at the direction of, or in association with" a group that meets the specific statutory conditions of a "criminal street gang," but also with the "specific intent to promote, further, or assist in any criminal conduct by gang members." [Citations.]'" (*Ibid*.) *Louen* stated, "[we] do not understand the due process clause to impose requirements of knowledge or specific intent beyond these." (*Ibid*.)

Vasquez seizes on this last quoted sentence to assert that *Louen* supports his position. He argues that *Louen* found the requirement of specific intent in the "specific intent to promote" language of section 186.22, subd. (b) and that it found the requirement of knowledge in the "for the benefit of, at the direction of, or in association with" language of section 186.22, subdivision (b). We do not believe such a dissection of the quoted sentence from *Louen* resolves in appellant's favor the issue he raises. *Louen* was not addressing the issue of a defendant's knowledge of his or her gang's primary activities. Therefore, to interpret this part of the sentence as the embodiment of a knowledge requirement regarding the primary activities element is an unwarranted extrapolation.

In this case, Vasquez and Rodriguez clearly knew about the current offense of murder, which is one of the enumerated offenses in section 186.22, subdivision (e). This offense alone showed that appellants were aware of and knowingly supported the gang's criminal activities. Rodriguez was carrying a loaded gun on the night of the murder, another example of their awareness. And, since the King Kobras commit so many of the enumerated crimes (as testified to by Detective Aguirre), it is a reasonable inference that appellants were aware of their commission. The group beating of Cerda by approximately five King Kobras was also a gang activity that was clearly criminal and which qualified as an enumerated offense. (See § 186.22, subd. (e)(1).) "Knowledge,

like intent, is rarely susceptible of direct proof and generally must be established by circumstantial evidence and the reasonable inferences to which it gives rise." (*People v. Buckley* (1986) 183 Cal.App.3d 489, 494-495; see also *People v. Lewis* (2001) 26 Cal.4th 334, 379 ["'Reliance on circumstantial evidence is often inevitable when, as here, the issue is a state of mind such as knowledge.' [Citation.]"].) Moreover, appellants' active participation in the gang and the expert's testimony concerning the culture of gangs—their control of certain limited areas to enable them to commit crimes, their violent means of defending their territory, their rivalries with other gangs, and their violent way of dealing with incursions into their territory, as evidenced by the instant case—constitute substantial circumstantial evidence of appellants' knowledge of criminal gang activity. We cannot say under the appropriate standard of review that the jury did not draw a reasonable inference in concluding appellants were aware of their gang's primary activities.

People v. Carr (2010) 190 Cal.App.4th 475, which Vasquez cites in his reply brief, does not aid his claim. In that case, the court held, just as we have here, that the jury could draw a reasonable inference that the defendant knew of the criminal activities of his gang from the "'circumstantial evidence regarding the actions of the accused.'" (*Id*. at pp. 488-489.) The court stated, "just as a jury may rely on evidence about a defendant's personal conduct, as well as expert testimony about gang culture and habits, to make findings concerning a defendant's active participation in a gang or a pattern of gang activity, it may also rely on the same evidence to infer a defendant's knowledge of those activities." (*Id*. at p. 489.)

Moreover, due process concerns would only arise if the enhancement failed to provide, "'(1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt.'" (*People v. Gamez*, *supra*, 235 Cal.App.3d at p. 975.) These criteria are met in the gang statute. "The requirement that defendant commit the crime for the benefit of or in the association with the gang and with the specific intent to promote, further, or assist members of the gang in

any criminal conduct is sufficient to appease any concerns regarding a violation of due process based upon 'pure' association." (*Id*. at pp. 976.) We reject appellants' argument.

E. Jury Instruction on Primary Activities Element

Vasquez argues that the jury instruction on the primary activities element of the gang enhancement was inaccurate, and therefore the enhancement must be reversed.[8] He contends that the instruction incorrectly listed "possession of narcotics" and "possession of hand guns" as offenses that could be considered in determining the primary activities element, whereas only possession *for sale* of narcotics and possession of a handgun *by a felon* are primary-activity offenses. Moreover, the "'possession of hand guns'" language allowed the jury to consider Rodriguez's handgun possession crimes, even though those offenses were committed after the murder of Cerda. According to Vasquez, these were errors of state law and of federal constitutional dimension, since the overbroad instruction lessened the prosecutor's burden of proof on the enhancement in violation of due process and the Sixth Amendment right to a jury trial.

Under section 186.22, subdivision (f), the prosecution need only prove that one criminal act enumerated in subdivision (e) was a primary activity. Because the jury was instructed that they could consider the commission of murders, drive-by shootings, and vehicle thefts in addition to "possession of handguns" and "narcotics offenses," the insertion of the latter two crimes without clarification was harmless beyond a reasonable doubt. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 388.) The jury had before it the crime of murder committed by the King Kobras gang members on trial. Detective

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8 In CALCRIM No. 1401, the trial court instructed the jury in pertinent part as follows: "A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] 1. That has a common name or common identifying sign or symbol; [¶] 2. That has, as one or more of its primary activities, the commission of *murders, drive by shootings, possession of hand guns, vehicle thefts, narcotics offenses*. AND [¶] 3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity." (Italics added.)

Aguirre's testimony that the primary activities of the gang included drive-by shootings also provided support for a true finding on the primary activities element. We reject appellants' argument regarding the contents of CALCRIM No. 1401 in this case.

F. Constitutional Claims

We have concluded that the gang expert testimony was properly admitted under state law and relevant and probative on the issues related to the gang allegations, and that there was no prejudicial error in the instruction on the gang allegation. Having reached these conclusions, appellants' constitutional claims of a violation of due process, the right to a fair trial, and the right to have a jury decide their guilt must fail. (See, e.g., *People v. Carter* (2003) 30 Cal.4th 1166, 1196 [defendant's claim of federal constitutional error is entirely dependent on claim of state law error and must also fail]; *People v. Ayala* (2000) 23 Cal.4th 225, 253 ["There was no violation of state law, and because defendant's constitutional claims are predicated on his assertion that state law was violated, they too must fail."].)

III. Firearm Enhancements Based on Section 12022.53, Subdivision (e)(1)

Vasquez contends that, since the provisions of section 12022.53 were made applicable to both appellants by means of subdivision (e)(1) of section 12022.53, which requires the section 186.22, subdivision (b) gang enhancement to be pleaded and proved, the firearm enhancements must be set aside if any of Vasquez's challenges to the gang enhancement prevails. Vasquez points out that, although the prosecution's primary position at trial was that Vasquez was the shooter and not an aider and abettor, the firearm enhancements were pleaded and presented to the jury as solely an armed principal enhancement.

Vasquez also argues that, whether the enhancements in section 12022.53 are alleged against a shooter or a nonshooter, in all cases, a gang-benefit finding is a prerequisite to the application of the enhancement. He contends that prior cases have incorrectly assumed that a gang finding is required only when a defendant is a nonshooter. Vasquez bases his interpretation on the language in section 12022.53,

subdivision (e)(1), which provides that "(1) The enhancements provided in this section shall apply to *any person who is a principal* in the commission of an offense if both of the following are pled and proved . . . ." Because the phrase "any person who is a principal" has an established meaning and includes both "those persons who directly commit the act" and "also aiders and abettors," Vazquez argues that by its plain terms, section 12022.53, subdivision (e)(1) is not limited solely to aiders and abettors. (See *People v. Garcia* (2002) 28 Cal.4th 1166, 1171, fn. 3.) It applies to any person who is a principal and therefore includes actual shooters.

Vasquez is correct that, in count 1, the information alleged with respect to all three defendants that a *principal* personally and intentionally discharged a firearm, and that the prosecutor himself requested that the jury be instructed only as to an armed principal. Because we have concluded that appellants' arguments regarding the gang allegation are without merit, however, the firearm enhancement under section 12022.53, subdivisions (b) and (e) properly applies to both Vasquez and Rodriguez, whether Vasquez was considered the shooter or an aider and abettor.

We need not address at length Vasquez's unique interpretation of section 12022.53, subdivision (e). If correct, his construction would result in these firearm enhancements being applied only to gang members who commit their crimes for the benefit of, at the direction, of or in association with their criminal street gang, and not to any nongang members who commit crimes with guns. Section 12022.53, by its own terms, applies to any *person* who personally uses or intentionally discharges a firearm in the commission of the enumerated felonies. (§ 12022.53, subd. (b).) The anomalous application of the statute that would result from appellant's proposed interpretation was clearly not within the contemplation of the Legislature.

IV. Trial Court's Refusal to Instruct on Voluntary Manslaughter

A. Rodriguez's Argument

Rodriguez contends the trial court prejudicially erred by failing to instruct the jury on voluntary manslaughter upon sudden quarrel or in the heat of passion as a lesser

included offense of murder.[9] This violated Rodriguez's federal constitutional rights to due process, to trial by jury and the right to counsel and to present a defense in violation of the Fifth, Sixth, and Fourteenth Amendments. He maintains that the record contains sufficient evidence that he acted in response to the adequate provocation of Cerda punching him in the face and stabbing him with a knife.

According to Rodriguez, the trial court erroneously concluded that the instruction was not warranted because Rodriguez was the initial aggressor. However, Dominic's testimony showed that Vasquez was the initial aggressor, and Rodriguez only joined in the fracas after Vasquez and Cerda exchanged words and blows. Rodriguez maintains there was substantial evidence, such as the trail of blood, that Cerda was armed with a switchblade that night and that he cut Rodriguez. The question of whether sufficient time for passion to cool had elapsed in the 15 minutes between Cerda bloodying Rodriguez and Rodriguez handing the gun to Vasquez was for the jury to decide. He argues that, even though a trial judge may find the evidence less than convincing, it must instruct the jury on the defense theory. (*People v. Turner* (1990) 50 Cal.3d 668, 690.)

B. Proceedings Below

During the discussion on jury instructions among counsel and the trial court, the trial court stated that it believed self-defense or heat of passion may not be available to a defendant if he is the initial aggressor. The court observed that Cerda told Criminal he was at the party only to take care of his little brothers. Cerda and Criminal shook hands, and Criminal walked away. After that, Cerda was "put upon" by a group that included appellants.

Rodriguez's counsel, Mr. Lindars, disagreed. He argued there was sufficient circumstantial evidence to warrant the instruction based on Rodriguez having been

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9 Rodriguez's counsel asked for instructions on self-defense and voluntary manslaughter based on imperfect self-defense also. The trial court found that, on the facts of the case, where the victim ran and hid, no reasonable jury would find a belief or mistaken belief in the need to shoot.

stabbed by Cerda. He pointed to the bloody knife wrapped in a bandana, which was found on the patio at the point furthest from the perpetrators, and the trail of blood leading from the party site—blood that was shown to be Rodriguez's. Also, the jailhouse recording contained several references to Rodriguez having been stabbed or cut.

The trial court posited that, even assuming Rodriguez was stabbed, the fact that the defendants were the initial aggressors still undercut the evidence supporting the heat of passion instruction. Mr. Lindars argued that the evidence showed that Cerda "had taken it to a whole new level" by producing a deadly weapon and using it. The context meant that this would be an extreme insult to members of the King Kobras. He argued that the jury might not accept it as a valid theory, but it should be offered to them for their acceptance or rejection. The trial court pointed out that there was "a break in the action" after the melee in the backyard and the shooting. Mr. Lindars argued that it then became a question of fact for the jurors as to whether or not there had been a reasonable cooling-off period.

The prosecutor argued that Rodriguez did not respond to any provocation or heat of passion. Rather, he passed the gun to his friend and told him to shoot. He pointed out that none of the witnesses saw Cerda with a knife that night. The evidence regarding the blood on the knife was conflicting, and Rodriguez did not tell police during his interview that he was stabbed.

The trial court ultimately ruled that, on the facts of the case—where the defendant was the initial aggressor—a lesser included offense instruction of manslaughter was not available.

C. Relevant Authority

"The trial court is charged with instructing upon every theory of the case supported by substantial evidence . . . ." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) Substantial evidence is evidence that is "reasonable, credible and of solid value." (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1165; *People v. Crew* (2003) 31 Cal.4th 822, 835.) Pure speculation does not constitute the requisite substantial evidence

sufficient to support a lesser included offense instruction. (*People v. Wilson* (1992) 3 Cal.4th 926, 942.) The failure to instruct on a lesser included offense is reviewed de novo. (*People v. Licas* (2007) 41 Cal.4th 362, 366 ["'We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense.'"].)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Voluntary manslaughter is the intentional but nonmalicious killing of a human being. (§ 192; *People v. Manriquez* (2005) 37 Cal.4th 547, 583; *People v. Benavides* (2005) 35 Cal.4th 69, 102.) Voluntary manslaughter is a lesser included offense of murder. (*People v. Manriquez*, *supra*, at p. 583.) A killing may be reduced from murder to voluntary manslaughter if it occurs upon a sudden quarrel or in the heat of passion on sufficient provocation, or if the defendant kills in the unreasonable, but good faith, belief that deadly force is necessary in self-defense. (*Ibid*.)

"A heat of passion theory of manslaughter has both an objective and a subjective component. [Citations.]" (*People v. Moye* (2009) 47 Cal.4th 537, 549.) To satisfy the objective, or reasonable person, element of heat of passion voluntary manslaughter, the defendant's heat of passion must be attributable to sufficient provocation. (*Ibid*.) "To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation. [Citation.]" (*Id*. at p. 550.) "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201.)

The circumstances giving rise to the heat of passion are also viewed objectively. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 82-83.) A defendant may not set up his own standard of conduct and justify or excuse his acts because his passions were aroused, unless the facts and circumstances were sufficient to arouse the passions of the ordinarily

reasonable person. (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 584; *People v. Oropeza*, *supra*, at pp. 82-83.) "A defendant may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary and expect to reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion. The claim of provocation cannot be based on events for which the defendant is culpably responsible." (*People v. Oropeza*, *supra*, at p. 83.)

If the trial court fails in its duty to instruct on a lesser included offense supported by the evidence, the error is one of state law alone. (*People v. Breverman* (1998) 19 Cal.4th 142, 165.) It does not require reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. (*Id*. at p. 178; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

D. No Evidence Justified a Voluntary Manslaughter Instruction

Here, no evidence suggested Rodriguez acted in a heat of passion provoked by the victim. Rodriguez was one of the instigators of the quarrel, and he then instigated the use of deadly force against Cerda even though Cerda had run away and tried to hide. Because there was no evidence warranting a voluntary manslaughter instruction, there was no violation of due process. (See *Hopper v. Evans* (1982) 456 U.S. 605, 611; *People v. Verdugo* (2010) 50 Cal.4th 263, 293-295.)

The sequence of events was simply not one that would cause an ordinary person of average disposition to act in the heat of passion. Cerda merely defended himself when besieged by a group of attackers and then ran away the moment the fight stopped (when Rodriguez drew a gun). A person who provokes a fight cannot assert provocation by the victim, and Rodriguez was one of those provokers. (See *People v. Johnston*, *supra*, 113 Cal.App.4th at p. 1313.) Although Cerda was punched by Vasquez, one of the gang members who beat Cerda was Rodriguez. The fact that Cerda landed a good punch on Rodriguez's mouth does not relieve Rodriguez of his status as one of the initial aggressors. There was no evidence that Rodriguez was stabbed or that Cerda pulled a knife on anyone.

The evidence showed that Cerda ran from Rodriguez and Vasquez and desperately tried to hide from them. He called his girlfriend for help and tried to leave the area. Vasquez and Rodriguez found Cerda after a search, thanks to Rocha's spotting Cerda across the street. Cerda again ran and pounded on the door to gain access to the house. Rodriguez handed the gun to Vasquez and told him to shoot. Cerda was shot in a barrage of gunfire as he vainly sought cover under some chairs. There was absolutely no evidence of heat of passion. If anything, the shooting sprang from a desire for revenge against Cerda for daring to enter the King Kobras' territory and for landing a good punch on Rodriguez's mouth. A passion for revenge, especially when occasioned by rules set up by criminal street gangs, cannot satisfy the objective requirement for provocation. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144.)

Furthermore, any error in failing to give the voluntary manslaughter instruction was harmless under any standard. (*Chapman v. California*, *supra*, 386 U.S. at pp. 23-24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The eyewitness testimony under the circumstances of this case constitutes overwhelming evidence of Rodriguez's guilt of first degree murder.

V. Instruction Informing Jury That Aider and Abettor Is Equally Guilty

A. Rodriguez's Argument

Rodriguez argues that CALCRIM No. 400, which told the jury that an aider and abettor is equally as guilty as the person who directly committed the crime, violated his rights to due process and to trial by jury, and it lowered the prosecution's burden of proof. He contends an aider and abettor may be found guilty of a lesser crime than the perpetrator where there is evidence that he acted with a less culpable mental state than the perpetrator.

B. Proceedings Below

The trial court read CALCRIM No. 400 as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator,

who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."[10]

C. Analysis

As a preliminary matter, Rodriguez has forfeited the issue on appeal. In *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 (*Samaniego*), we held that the defendant forfeited any objection to CALCRIM No. 400 because a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested clarifying or amplifying language. We stated that, because CALCRIM No. 400 was generally an accurate statement of law, although misleading in that case, the defendant was obligated to request modification or clarification. Since he failed to do so, he forfeited the contention. (*Samaniego*, *supra*, at p. 1163.) In any event, as occurred in *Samaniego*, even if Rodriguez's contention had been preserved for appeal, we would conclude he suffered no prejudice.

People v. McCoy (2001) 25 Cal.4th 1111 held that "when a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea. If that person's mens rea is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator." (*Id*. at pp. 1117, 1122.) In *Samaniego* we stated that, "[t]hough *McCoy* concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator, its reasoning leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state. . . . Consequently, CALCRIM No. 400's direction that '[a] person is *equally guilty*

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10 CALCRIM No. 400 has been amended to read: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. [¶] A person *is guilty* of a crime whether he or she committed it personally or aided and abetted the perpetrator." (Italics added.)

of the crime . . . whether he or she committed it personally or aided and abetted the perpetrator who committed it' [citation], while generally correct in all but the most exceptional circumstances, is misleading [in a murder case] and should have been modified." (*Samaniego*, *supra*, 172 Cal.App.4th at pp. 1164-1165.)

We conclude that this case was not an exceptional one, and Rodriguez therefore suffered no prejudice. To the extent the instructional error affected Rodriguez's constitutional rights, we examine the error under the harmless error test set forth in *Chapman v. California*, *supra*, 386 U.S. 18, which requires us to be convinced beyond a reasonable doubt that the jury's verdict would have been the same absent the error. (See, e.g., *Samaniego*, *supra*, 172 Cal.App.4th at p. 1165.)

The jurors necessarily resolved the issue of Rodriguez's mental state against him under other properly given instructions. In addition to CALCRIM No. 400, the trial court read CALCRIM No. 401, which explained that, to prove a defendant is guilty of a crime based on aiding and abetting that crime, the People had to prove that (1) that the defendant "knew that the perpetrator intended to commit the crime," and (2) that, before or during the crime, "the defendant intended to aid and abet the perpetrator in committing the crime." This specific instruction overcame any generality found in CALCRIM No. 400. The court also instructed with CALCRIM No. 520, which told the jury: "To prove that the defendant is guilty of [murder], the People must prove that . . . [t]he defendant committed an act that caused the death of another person" and that, "[w]hen the defendant acted, he had a state of mind called malice aforethought." CALCRIM No. 521 instructed the jury that "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation." The instruction explained the element of premeditation in the prosecution's first degree murder theory. It told the jury that, if the prosecutor did not meet its burden of proving first degree murder, the jurors were required to find the defendant not guilty of first degree murder.

By convicting Rodriguez of first degree murder under these instructions, the jury necessarily found that he acted, either on his own or as an aider and abettor, willfully and

with the intent to kill. Therefore, it is clear beyond a reasonable doubt that the jury's findings of guilt would not have been different had CALCRIM No. 400 been modified to delete any suggestion that Rodriguez was "equally" as guilty as the shooter.

Our conclusion that the trial court's instruction with CALCRIM No. 400 did not prejudice Rodriguez also resolves his claim that his trial counsel was ineffective because he did not object or request a modification of the instruction. As explained *ante*, we believe beyond a reasonable doubt that, under the facts of this case, appellant was not prejudiced by the instruction as read. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [defendant must show counsel's defective performance prejudiced the defense].)

In sum, when considering the instructions as a whole, the trial court's instruction on the general principles of aiding and abetting as outlined in CALCRIM No. 400 did not relieve the jury of finding that Rodriguez had the required mental state for first degree murder at the time of the shooting.

VI. Vasquez's and Rodriguez's Cumulative Error Claims

Rodriguez argues that if this Court concludes the two instructional errors of which he complains were not individually prejudicial, their cumulative effect provides a separate ground for reversal. He contends the errors had a synergistic effect in that the jury was not given the option of convicting Rodriguez of voluntary manslaughter, yet at the same time, the jury was told that Rodriguez was equally guilty of the shooting without regard to his intent.

As for the failure to instruct on voluntary manslaughter, the jury had the opportunity of convicting Rodriguez of second degree murder and chose first degree murder instead. The jury clearly found premeditation and deliberation. We have concluded that the reading of an unmodified version of CALCRIM No. 400 did not prejudice Rodriguez under the facts of this case. With respect to Vasquez, we have not found any merit in his claims of error, and there can be no cumulative error if the challenged rulings were not erroneous. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1382.) In the instant trial, there was no breakdown in the adversarial process that

requires reversal for cumulative error. (*United States v. Hasting* (1983 461 U.S. 499, 508-509 [recognizing there is no such thing as an error-free, perfect trial, and the Constitution does not guarantee such a trial]; see *People v. Cunningham* (2001) 25 Cal.4th 926, 1009 [defendant entitled to a fair trial but not to a perfect one].)

VII. Effect of Counts 2 and 3 Not Being Read in Open Court

A. Rodriguez's Argument

Rodriguez contends that, although the jury returned written verdicts finding him guilty of two counts of possession of a firearm by a convicted felon in violation of section 12021, subdivision (a)(1), the jury did not orally declare and thereby endorse the verdicts. This resulted in a violation of his right to trial by jury. Therefore the convictions in counts 2 and 3 must be reversed.

B. Proceedings Below

The record shows that a different judge than the trial judge received the verdicts. The three jury verdicts on count 1 were read in open court with regard to Vasquez, Rodriguez, and Rocha. After the last verdict on count 1 was read, the clerk asked the ladies and gentlemen of the jury if these were its verdicts and the jury responded in the affirmative. At the request of Vasquez's and Rodriguez's attorneys, the jurors were polled, and they all answered in the affirmative. The judge instructed the clerk to record the verdict. The judge then informed the jury members that they had completed their service, thanked them, and dismissed the jury. The proceedings were concluded. The record contains completed guilty verdict forms in counts 2 and 3 signed by the foreperson.

C. Relevant Authority

Section 1149 provides: "When the jury appear they must be asked by the Court, or Clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same."

Section 1163 provides: "When a verdict is rendered, and before it is recorded, the jury may be polled, at the request of either party, in which case they must be severally

asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation."

Section 1164, subdivision (a), provides in relevant part: "When the verdict given is receivable by the court, the clerk shall record it in full upon the minutes, and if requested by any party shall read it to the jury, and inquire of them whether it is their verdict. If any juror disagrees, the fact shall be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall . . . be discharged from the case."

A verdict is rendered when it has been received and read by the clerk, acknowledged by the jury, and recorded. (*People v. Hendricks* (1987) 43 Cal.3d 584, 597; *People v. Bento* (1998) 65 Cal.App.4th 179, 188.) Jury acknowledgement of the verdict in open court is essential to the validity of the verdict. (*People v. Thornton* (1984) 155 Cal.App.3d 845, 858.) If the jury merely returns a written verdict, but fails to unanimously endorse the verdict in open court, the verdict cannot normally be sustained based solely on the written form. (*Ibid*.; see *People v. Green* (1995) 31 Cal.App.4th 1001, 1009; *People v. Mestas* (1967) 253 Cal.App.2d 780, 786.) "A verdict must be rendered in open court." (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 44, p. 71.)

Acknowledgement of the verdict in open court may be performed by the foreperson on behalf of the entire jury. (§§ 1149, 1163, 1164, subd. (a); *People v. Wiley* (1931) 111 Cal.App. 622, 625; *Stalcup v. Superior Court* (1972) 24 Cal.App.3d 932, 936, disapproved on other grounds in *People v. Dixon* (1979) 24 Cal.3d 43, 53.) Additionally, upon request of either party, the jurors may be required to individually acknowledge the verdict through the process of individual polling. (§§ 1149, 1163, 1164.)

The acknowledgment requirement and the defendant's right to request individual polling are founded on the constitutional right to a unanimous jury verdict. (*People v. Thornton, supra*, 155 Cal.App.3d at pp. 858-859.) During the acknowledgment and polling, any juror is entitled to dissent from the verdict. (*Id*. at p. 859.) The process is

designed to reveal mistakes in the signing of a particular form or "that one or more jurors acceded to a verdict in the jury room, but was unwilling to stand by it in open court." (*Ibid*.)

D. Verdicts Not Rendered

In *Thornton*, the court found prejudicial error when a written verdict form was never acknowledged in open court before discharge of the jury, thereby depriving the defendant of his right to test the verdict in open court at the time of its receipt. (*Thornton*, *supra*, 155 Cal.App.3d at pp. 856-860.) The jury had returned verdicts acquitting the defendant of the charged offenses, but it had also submitted a verdict form finding defendant guilty of a lesser included offense. (*Id*. at p. 848.) The trial court did not notice this verdict form until after the jury had been discharged. (*Id*. at pp. 848-850.) The Court of Appeal held that the verdict form convicting defendant of the lesser included offense could not be given legal effect. The court held that "the only true verdict was the one finding [defendant] not guilty of the charged offense, since that was the only verdict unanimously endorsed by the jurors in open court." (*Id*. at p. 858.)

In the instant case, as in *Thornton*, the judge acting on behalf of the trial court discharged the jury without receiving the verdicts in count 2 and 3. This case does not involve the mere failure to poll the jurors, but rather the complete failure to present the verdict and to have it formally acknowledged in open court.

When the jurors are present in the courtroom but not individually polled, the jurors still hear the verdict and have the opportunity to raise an objection. When the presentation is entirely eliminated, however, the jurors have no opportunity to "declare, up to the last moment, that he [or she] dissents from the verdict." (*Chipman v. Superior Court* (1982) 131 Cal.App.3d 263, 266.) The declaration of the verdict in open court is essential to ensure a unanimous jury verdict, a fundamental right guaranteed by the California Constitution. (*People v. Collins* (1976) 17 Cal.3d 687, 693.) Under these circumstances, Rodriguez may properly raise the issue on appeal even though no objection was made below.

Rodriguez was entitled to have the jury openly acknowledge its verdict and confirm that each juror was willing to stand by his or her individual vote. The error is structural and requires reversal. (See *People v. Cahill* (1993) 5 Cal.4th 478, 501-502.) "[I]n some instances [errors] may result in a 'miscarriage of justice' . . . without regard to the strength of the evidence presented at trial, because . . . they operate to deny a criminal defendant the constitutionally required 'orderly legal procedure . . . .'" (*Id*. at p. 501; see *People v. Thornton*, *supra*, 155 Cal.App.3d at pp. 859-860.)

Given that we are reversing the judgment in counts 2 and 3, we need not address Rodriguez's argument that there was insufficient evidence to support the gang enhancements, which the verdict form indicates the jury found "true," in these counts.

VIII. Rodriguez's Custody Credits

Rodriguez argues that he was entitled to one more day of custody credit for a total of 629 days. Vasquez presumably joins in this argument.

The record shows that Vasquez and Rodriguez were arrested on September 24, 2008, and sentenced on June 14, 2010. Therefore, they were entitled to 629 actual days of credit. Although a murder defendant is not entitled to work time or conduct credits, he is entitled to custody credits for actual time spent in custody prior to sentencing. (§§ 2900.5, subd. (a) [custody credits]; 2933.2, subd. (a) [murder defendant not entitled to work time or conduct credits]; *People v. Herrera* (2001) 88 Cal.App.4th 1353, 1366-1367.)

DISPOSITION

The judgments in counts 2 and 3 against Rodriguez are reversed. In all other respects the judgments are affirmed. The superior court is ordered to amend the abstracts of judgment to show that Vasquez and Rodriguez are entitled to 629 days of credit for time served.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
CHAVEZ